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SUPREME COURT OF THE UNITED STATES.

No. ~~214.~~ 127

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

WILLIAM P. SHEFFIELD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

affirm

Miller

1 United States of America, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, or some of you, between William P. Sheffield, plaintiff, and the mayor, aldermen, and commonalty of the city of New York, defendants, a manifest error hath happened, to the great damage of the said the mayor, aldermen, and commonalty of the city of New York, as is said and as appears by their complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this fifteenth day of December, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

KENNETH G. WHITE,
Clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit.

2 United States of America,
Southern District of New York, ss:

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the following pages, numbered from 1 to 65, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the mayor, aldermen, and commonalty of the city of New York, pl'ff in error, William P. Sheffield, def't in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28th day of Nov., in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

KENNETH G. WHITE, *Clerk.*

I allowed the within writ of error.
Dated N. Y., Dec. 15, 1863. WM. D. SHIPMAN, *Judge.*
Filed Dec. 17, 1863.

3 In the circuit court of the United States for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the city of New York, of the term of October, in the year of our Lord one thousand eight hundred and sixty-two.

Witness the Honorable Samuel Nelson, one of the judges of said court; Kenneth G. White, esquire, clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss*

Be it remembered, that heretofore, to wit, at a term of the circuit court of the United States for the southern district of New York, held at the city of New York, in the said district, before the judges of the said court, on the twentieth day of October, 1862, the mayor, aldermen, and commonalty of the city of New York, a municipal corporation existing under and by virtue of the laws of the State of New York, were summoned to answer unto William P. Sheffield, of the city and county of Newport, in the State of Rhode Island, of a plea of trespass on the case for personal injuries, to his 4 damage of twenty-five thousand dollars, by summons personally served upon George Opdyke, mayor of said corporation, in said southern district of New York; and thereupon the said William P. Sheffield, plaintiff, declared against the said the mayor, aldermen, and commonalty of the city of New York, defendants, as follows, to wit:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William P. Sheffield, the plaintiff in this suit, by Thomas Vernon, his attorney, complains of the mayor, aldermen, and commonalty of the city of New York, the defendants in this suit, of a plea of trespass on the case, and declares and avers that the said plaintiff is a citizen of the State of Rhode Island; that the said defendant is a public corporation existing under and by virtue of the laws of the State of New York, and existing and exercising its corporate functions within said State of New York, and that the claim of the said plaintiff against the said defendant exceeds, exclusive of costs, the sum of five hundred dollars.

And the said plaintiff further complains of the said defendant, for that before and at the time of the committing of the grievances hereinafter mentioned, the said defendant was the owner and occupier of a certain 5 close or public park, called the City Hall Park, with the appurtenances, situate and being in the said city of New York, and butted and bounded upon two certain streets or public places called Park Row and Broadway, and of the adjacent land *land* forming the said streets or public places, and embraced and included within the limits thereof, and which said land had been for a long time, to wit, for fifty years previously thereto, and then was, by the said defendant appropriated to the public use, and used as and for a public street and highway, and during all that time it had been and was the duty of said defendants, and they had been accustomed, to repair and free from obstructions or impediments and fit for convenient and safe use and travel thereof by the citizens of the said city and all other persons lawfully travelling the same; yet the said defendants, disregarding their said duty in that behalf, on the 16th December, 1857, at the place aforesaid, to wit, at the city and in the county of New York aforesaid, in violation of their duty, omitted and neglected to repair and keep the same in repair and free from obstructions or impediments, or fit for safe and convenient use by the public for travel as aforesaid, but negligently, injuriously, and 6 wrongfully suffered and permitted the same to be and remain out of repair, and wrongfully, and negligently, and injuriously suffered and permitted a stump of a tree, which projected from the ground to a great distance, to wit, to the extent of one foot above the surface thereof, to obstruct and impede the public use of the said land and premises, and render the same unsafe and unfit for the purposes of travel, and dangerous

to life, and wrongfully neglected and refused to remove or cause said obstruction and impediment to be removed, although the said defendant well knew and had due notice of the same, and were requested so to do, but suffered and permitted the same there to remain, and neglected to fix or place or cause to be placed or fixed any light or signal at or near the same to warn travellers thereof, all which said acts and omissions are in violation of the charter of the said defendants, and their laws and ordinances, and in consequence of which said negligence and improper conduct of the defendants in that respect, afterwards, to wit, at about half after six o'clock in the evening of the said sixteenth day of December, the said plaintiff was lawfully and with due care and diligence, and in the lawful pursuit of his business, walking in the said Park Row, the said public street and highway,
7 at the foot of the said public park, and while so walking at said time
and place, without any negligence upon the part of this plaintiff, but by reason of the said wrongfulness and negligence of the said defendant, this said plaintiff ran against and came in contact with the said stick of wood or stump of a tree, and was in consequence thereof thrown violently down upon the sidewalk, and sustained a compound fracture of the bone of the right leg above the knee, and underwent and suffered great and exhausting bodily pains; that in consequence of the premises this plaintiff became sick and permanently lame, and the said leg was rendered three and one-half inches shorter than it was before said compound fracture; that by reason of the premises this said plaintiff was during the space of nearly a year prevented from attending to his business, and in consequence thereof sustained a loss in his said business to the amount of eight thousand dollars, and was compelled to and did expend the sum of four thousand dollars in endeavoring to be healed of his said injury, and is permanently injured, so that he will never be as strong or able to carry on his said business as efficiently as before said fracture, and was otherwise greatly injured, to his damage to the amount of twenty-five thousand dollars. And therefore he brings suit.

8 This plaintiff further declares and avers that on the third day of December, A. D. one thousand eight hundred and sixty, he made a demand in writing upon the comptroller of the said city of New York, for the adjustment of his said claim for damages arising out of the aforesaid personal injuries against the said defendant; that on the eighteenth day of January, A. D. one thousand eight hundred and sixty one, he made a second demand in writing upon the said comptroller for the adjustment of his said claim, and that on the fifth day of December, A. D. one thousand eight hundred and sixty-one, the said comptroller refused to make any adjustment or payment of said claim.

And the said plaintiff, for another and separate cause of action, further says and complains that he is a citizen of the State of Rhode Island, as aforesaid; that the said defendant in this action is a public corporation, as aforesaid, and that the claim of the said plaintiff, exclusive of costs, exceeds the sum of five hundred dollars; that at the time of the grievances hereinafter mentioned a certain street or public place, called Park Row, in the said city of New York, was, and still is, a common public street and highway;
9 that it was at the time of the grievances herein complained of, and
still is, the duty of said defendant to keep the same in repair and free from obstructions, but that the defendant well knowing the premises, and in violation of such duty, to wit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, during the evening and night time of said day, wrongfully, negligently, and injuriously obstructed the said highway and street, and rendered the same dangerous for travelling and walking, by placing or standing, or causing and allowing to be placed

and to stand in the sidewalk of the said public street and highway, a large stick of wood or stump of a tree, without fixing or placing a light or signal at or near such stick or stump, to denote or show that the same was so placed and standing as aforesaid; that although well knowing the premises, the said defendant did not remove the same obstruction from the said sidewalk of the said highway; that at about half after six o'clock in the evening of the said last-mentioned day the said plaintiff, lawfully and in the pursuit of his lawful occupation, with due care and diligence, was walking
10 in the said Park Row, the said public highway, and while so walking
at said time and place, without any negligence on the part of this plaintiff, but by reason of the wrongfulness and negligence of the said defendant, this plaintiff ran against and came in contact with the said stick of wood or stump of a tree, and was in consequence thereof thrown violently down upon the sidewalk, and sustained a compound fracture of the bone of the right leg above the knee, and underwent and suffered great and exhausting bodily pains; that in consequence of the premises this plaintiff became sick and permanently lame, and the said leg was rendered three and one half inches shorter than it was before said compound fracture; that by reason of the premises this said plaintiff was during the space of nearly a year prevented from attending to his business, and in consequence thereof sustained a loss in his said business to the amount of eight thousand dollars, and was compelled to and did expend the sum of four thousand dollars in endeavoring to be healed of his said injury, and is permanently injured, so that he will never be as strong or able to carry on his said business as efficiently as before said fracture, and was otherwise greatly injured,
11 to his damage to the amount of twenty-five thousand dollars. And
therefore he brings suit.

The plaintiff further declares and avers that on the third day of December, A. D. one thousand eight hundred and sixty, he made a demand, in writing, upon the comptroller of the said city of New York for the adjustment of his said claim for damages, arising out of the aforesaid personal injuries, against the said defendant; that on the eighteenth day of January, A. D. one thousand eight hundred and sixty-one, he made a second demand, in writing, upon the said comptroller, for the adjustment of his said claim, and that on the fifth day of December, A. D. one thousand eight hundred and sixty-one, the said comptroller refused to make any adjustment or payment of said claim.

Wherefore the said plaintiff demands judgment against the said defendant for the sum of twenty-five thousand dollars.

Plea.

And the said the mayor, aldermen, and commonalty of the city of New York, defendants in this suit, by Greene C. Bronson, their attorney,
12 come and defend the wrong and injury when, &c., and say that they
are not guilty of the said supposed grievances above laid to their charge, in manner and form as the said plaintiff hath above thereof complained against them, &c. And of this they, the said defendants, put themselves upon the country; and the said plaintiff doth the like.

And hereupon the process thereof is continued between the parties aforesaid of the plea aforesaid, in this same court, before the judges thereof, and the issue above joined is ordered to be tried at the term of this court appointed to be held at the city of New York, on the third Monday of October, A. D. one thousand eight hundred and sixty-three. And now, at this day, to wit, the twenty-eighth of November, being as yet of the last-mentioned October term, came the parties aforesaid, by their attorneys aforesaid, before the judges of the said court, and the jurors of the jury summoned to try

said issue, being called, also came, who, to speak the truth of the matters aforesaid, being chosen, tried and sworn, say upon their oaths that the said defendants are guilty of the premises above laid to their charge in
13 manner and form as the said plaintiff hath above complained against
them; and they assess the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, at ten thousand dollars, and for those costs and charges at six cents.

Therefore it is considered that the said plaintiff do recover against the said defendants his said damages, costs, and charges by the jurors aforesaid, in form aforesaid, assessed, and also eighty-seven dollars and thirty-four cents for his costs and charges by the court now here adjudged of, increase, to the said plaintiff, with his assent, which said damages, costs and charges, in the whole, amount to ten thousand and eighty-seven dollars and thirty-four cents.

And the said defendants in mercy, &c.

Judgment signed this seventh day of December, 1863.

Judgment signed this seventh day of December, A. D. 1863.

KENNETH G. WHITE, *Clerk.*

14 Endorsed: United States circuit court, so. dist. of New York. William P. Sheffield *vs.* the mayor, &c., of New York. Judgment record. Thomas Vernon, Pl'ffs Att'y.

Filed Dec'r 7, '63.

15 State of New York, *city and county of New York, ss:*

Circuit court of the United States for the southern district of New York, in the second circuit.

William P. Sheffield
vs.
The Mayor, Aldermen, and Commonalty of the City of New York.

Be it remembered, that in the term of October, in the year of our Lord eighteen hundred and sixty-one, came William P. Sheffield, by Thomas Vernon, his attorney, into the circuit court of the United States for the southern district of New York, in the second circuit, before the Hon. Samuel Nelson, one of the circuit judges of the United States of America, and impleaded the mayor, aldermen, and commonalty of the city of New York in a certain plea of trespass on the case.

Afterwards, to wit, at a circuit court, held at the court-house, in the city and county of New York, in and for the southern district of New York, in the second circuit, on the twenty-seventh day of November, in the year eighteen hundred and sixty-three, before the Hon. Samuel Nelson,
16 one of the circuit judges appointed to hold the said circuit court, the
aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city and county of New York aforesaid, for that purpose duly empannelled, good and lawful men of said county. At which day came there as well the said plaintiff as the said defendants, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, empannelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue, and upon the trial of the said issue, the counsel for the plaintiff, to maintain and prove the said issue on his part, called the plaintiff, who, being sworn as a witness in his own behalf, testified as follows: I am the plaintiff in this action, and reside at Newport, Rhode Island. I have resided there for several years, and

am nearly forty years old. I have been engaged in the practice of my profession as an attorney and counsellor-at-law, at Newport, since September, 1844. I met with an accident at the city of New York, on the 16th of December, 1859. It was near six o'clock in the evening of that day, I came out from the store No. 13 Park Row, and I crossed the street at or
17 near the southerly extremity of the City Hall Park. I was on my way to the New York Hotel, at which I was then boarding. The night was thick, cloudy, and foggy, and quite dark. At the southerly extremity of the park I approached the sidewalk. I saw the line of the walk, and I put my left foot upon the curb, brought forward my right foot, and hit it against some projection above the level of the sidewalk with considerable severity, so much so that my leg was broken. I think I felt the bone split while I was in the act of falling, and before I struck the walk part of the thigh bone protruded through the flesh and pantaloons. I fell upon the walk and partially turned over. I discovered this projection above the sidewalk. I cried for help, and two or three gentlemen came to my assistance and placed me in a carriage, and I was conveyed to the New York Hotel. Shortly after my surgeon came, Dr. John Crane, and subsequently the other, Dr. Carnochan. They attempted to reduce the fracture, or put the bone in position by drawing the leg away from the body. They were unable to do it. They made an incision in the leg, which was transverse, and not succeeding in reducing the fracture they made another longitudinally; they were then unable to reduce it, and finally they sawed off three inches
18 of the bone, when the fracture was reduced. I lay one hundred and eight days on my back, on a bed, which was supported by two boards, and my leg strapped with the splints, and during that time I was unable to be removed. During that time several severe operations were performed upon me, and I suffered intense agony. After the 100 days I was carried to the steamboat and taken to my home. The long splints were then taken off, but I wore the short splints until August, 1860, I think. I was compelled to use crutches until September, 1861. Particles of bone came out from time to time; the last piece came out in July or August, 1862. I was unable to attend to my business until the spring of 1863. My leg is now four inches shorter than it was before the accident. I still suffer pain from it in damp weather. I paid for the surgeon's and physician's attendances, nurses, and board, about $3,800. I had an extensive practice at Newport prior to the accident, as large as any one in the State out of Providence. Perhaps my practice required my attendance outside of Newport County.

Jesse M. Carter, a witness on behlf of the plaintiff, testified:

19 His business in December, 1859, was that of owner of the carriages at Powers's Hotel, and that he knew plaintiff; saw him in December, 1859, on the night of the accident. Just after it Mr. Thompson called me over and said there was a gentleman wanted a carriage. Mr. Thompson is gone to the war. I was standing at the hotel near the walk when Mr. Thompson called me. Plaintiff was then holding himself up by the iron rail of the park fence, and I asked him what the matter was, and he said he fell over something that projected up from the walk, and that he had broken his leg. I helped put him in a carriage and drove him to the New York Hotel. His leg was broken. I observed a stump near the curb. It was the stump of a tree; it looked as though the edges had rounded off or rotted off; it ran up something like a sugar loaf in the middle; the middle of it was the highest part, which was about six inches above the pavement; at the bottom the stump was as big round as the rim of that hat. For twelve years prior to the plaintiff's accident I had been the proprietor of the carriages at Powers's Hotel, in the vicinity of the place of the accident. I

had seen the stump there five or six years prior to the night of the accident to the plaintiff. Since the first time I saw the stump its outer edges have rotted and broken away. The plaintiff was opposite to it; he said
20 he had fallen over it. The stump was about six inches above the pavement, and about four inches in diameter at the top.

The deposition of Horatio N. Thompson, a witness on behalf of the plaintiff, was then read in evidence. He testified as follows:

I am a sergeant in the 3d New York Volunteer Artillery, and am starting for the seat of war with about forty-seven men under my charge. I am partially acquainted with plaintiff. The circumstances under which I became acquainted with him are in short these: I was boarding at Powers's Hotel, at the lower end of the park, at the time of the accident to the plaintiff. I started with my brother and another gentleman to go up Broadway; it was after dark. Crossing immediately to the park, as I stepped on the edge of the sidewalk, I heard a voice saying, "Gentlemen, I'm in trouble." I spoke and said, "What is the matter?" The answer from the party was "I have fallen over something there in the edge of the sidewalk and broke my leg." The person was holding himself up by the fence, the iron railing. Mr. Carter, Beardslee, my brother, and myself rode up in the carriage with Mr. Sheffield to the New York Hotel. The place of the accident was at the apex of the park. The curbstone there is about eight or ten inches
21 above the street. About fourteen inches from the curbstone we found the stump of a tree. We did not know what he had fallen over; we looked for the obstacle or impediment at the time of the accident, and we found this stump; it was very jagged in its form; it was hacked; I could see the axe marks on the stump. Its diameter at the bottom was eight inches or more; it was about eight inches above the sidewalk. This stump was the only thing that we found on the sidewalk. Plaintiff was standing at the fence, on one leg, opposite to the stump.

John M. Carnochan, a witness on behalf of the plaintiff, testified that he had practiced medicine and surgery some twenty years; is a professor in one of the New York medical colleges, and principal surgeon to a hospital; attended, together with Dr. Crane, plaintiff four months, at the New York Hotel. This witness corroborated plaintiff's testimony as to the aggravated nature of his injuries, the character of the surgical operations, and the extent of his sufferings. He also testified that for a long time he despaired of the plaintiff's life; and that his theory of the cause of the injury was that the plaintiff stumbled over some obstacle, and while trying to recover himself the muscles of the knee contracted so violently as to break the bone
22 before he struck the ground. He also testified that the plaintiff will suffer more or less pain from the injury all his life.

Martin E. Thompson, a witness on behalf of the plaintiff, testified:

I was the street commissioner of the defendants in the year 1847.

(The counsel for the plaintiff proposed to read in evidence certain proceedings of the boards of aldermen and assistants of the city of New York relative to the adjusting and shortening the City Hall Park, passed by the board assistants on the 8th November, 1847, and the board of aldermen on the 15th of November, 1847, and approved by the mayor of said city on the 18th November, for the purpose of showing, in connection with the testimony of Mr. Martin E. Thompson, the manner in which this portion of the pavement became dedicated to the public, and to show that the defendants were the owners of this fee, and that the park was shortened, and that this stump was the stump of a tree that had been formerly in the enclosure. The proceedings are as follows:

"*Resolved,* That the committee on lands and places, together with the street commissioner, be authorized to adjust the lower corner line of the park
so as to make a curve, instead of corners and angles, from Broadway
23 to Chatham street, and placing the railing on line of such curve.

"Adopted by the board of assistants November 8, 1847.

"Adopted by the board of aldermen November 15, 1847.

"Approved by the acting mayor November 18, 1847."

Counsel for the defendants objected to the said resolutions and proceedings being received in evidence, upon the ground that the corporation of the city of New York had no authority to pass such a resolution; which said objection was overruled by the court, and the defendants' counsel then and there duly excepted, and the said proceedings were then read in evidence.)

The witness further testified:

Q. In pursuance of that resolution did you adjust the lower end of the park?

A. I received a note from the clerk of the common council, I think, of the substance that you have read there, directing me, with the assistance of the committee on lands and places, to make a circle there in place of the square.

Q. Prior to that time the lower end of the park was square?

A. Yes, sir; it was a straight line, with the exception of the angles
24 curved to meet the straight lines—straight in front where the wall
stood.

Q. How did you adjust it when you adjusted it?

A. I took the city surveyor with me and we fixed on a centre of a radius to strike the circle.

Q. And in doing so you shortened the park?

A. Yes, sir; about twenty feet.

Q. And the portion of the land which was in the park you threw out on the pavement?

A. Yes, sir.

Q. This portion prior to the time when you cut it off was in the enclosure of the park?

A. Yes, sir; this run out here twenty feet.

Q. The lower line of the park ran down below the outer line of the pavement?

A. Yes, sir.

Q. In this piece that you threw out do you recollect of there being one tree?

A. The question was asked me the other day, and I had an indistinct recollection of there being one or two small trees there.

Q. What is your age?

A. I have seen 76 years.

Q. How long have you known the City Hall Park?

A. I think I knew it the time the City Hall was commenced.

Q. What year was that?

25 A. 1805 or 1806, I think.

Q. And you have known it since that time?

A. Yes, sir.

Q. During all that time had any other person besides the corporation controlled or exercised management over the park?

A. I was only a visitor here until 1815. Since that I have been a resident. I know it no further than I have always had the privilege of walking through it without any hindrance.

Q. Have they erected any buildings on it since you knew it?

A. It seems to me that the City Hall was erecting the first time I knew it.

Q. Do you recollect when the hall of records was put up?

A. No, sir. I made a plan for the alteration of it, which the city adopted.

Q. You recollect where the old Bridewell stood?

A. Yes, sir.

Q. That has been torn down since?

A. Yes, sir.

Q. Do you recollect of the posts and pillars being taken away from the Broadway side and from the Chatham street side and those posts put there?

A. They were sold by auction and bought by   . The two balls which stood on them I had put on the Union Park when I was street
26 commissioner.

Q. And those pillars and balls stood at the lower end of the park where you cut it off?

A. Yes, sir.

Q. Has any other person, to your knowledge, besides the corporation of the city, exercised ownership over any portion of the land before you made this alteration or since?

A. I never knew or heard of any. I heard of some dispute many years ago.

Q. After you threw this piece out into the public street and formed this pavement the railing was put back?

A. Yes, sir.

Q. And since that was put back and this piece was thrown out in the public street it has been used as a portion of the public streets, highways, and sidewalks?

A. Yes, sir.

Q. How soon after this resolution of the common council did you cut off this piece?

A. I think a few days; perhaps the same day. It could not have been long after.

Q. When were you street commissioner after 1847?

A. Up to January, 1850.

Q. Did you receive the direction of the committee on lands and places with reference to making this alteration?

27 A. I received the notice from the clerk of the common council. I think I spoke to one or two of the committee, and they said I knew all about it, and to do it as I thought best. I never had any complaint made about it after that, consequently I presume it was done right.

Cross-examined.

Q. What was the form of the southern extremity of the park prior to your making this change under the resolution of the common council?

A. I have employed a city surveyor, and he has got a map, which I presume is correct.

Q. Was it a square or a curve?

A. It was a straight line with a curve where it met the line of the street.

Q. You say this stump was previously within the line of the park?

A. I have an indistinct recollection that there were one or two trees that we threw out.

Q. How many feet did you take off the extremity of that park?

A. About 20 feet as near as I can recollect.

Q. by the court. Was there a street passing through Park Row to Broadway, and past this spot before you changed the park?

A. That has been so since I recollect.

Q. So that when you threw out into the street a portion of the park
28 you widened a street that was already in existence?

A. Yes, sir.

"*Resolved*, That the committee on lands and places, together with the street commissioner, be authorized to adjust the lower corner line of the park so as to make a curve, instead of corners and angles, from Broadway
23 to Chatham street, and placing the railing on line of such curve.

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Q. What is your age?

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Q. How long have you known the City Hall Park?

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Q. What year was that?

25 A. 1805 or 1806, I think.

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Q. Have they erected any buildings on it since you knew it?

A. It seems to me that the City Hall was erecting the first time I knew it.

Q. Do you recollect when the hall of records was put up?

A. No, sir. I made a plan for the alteration of it, which the city adopted.

Q. You recollect where the old Bridewell stood?

A. Yes, sir.

Q. That has been torn down since?

A. Yes, sir.

Q. Do you recollect of the posts and pillars being taken away from the Broadway side and from the Chatham street side and those posts put there?

A. They were sold by auction and bought by   . The two balls which stood on them I had put on the Union Park when I was street
26 commissioner.

Q. And those pillars and balls stood at the lower end of the park where you cut it off?

A. Yes, sir.

Q. Has any other person, to your knowledge, besides the corporation of the city, exercised ownership over any portion of the land before you made this alteration or since?

A. I never knew or heard of any. I heard of some dispute many years ago.

Q. After you threw this piece out into the public street and formed this pavement the railing was put back?

A. Yes, sir.

Q. And since that was put back and this piece was thrown out in the public street it has been used as a portion of the public streets, highways, and sidewalks?

A. Yes, sir.

Q. How soon after this resolution of the common council did you cut off this piece?

A. I think a few days; perhaps the same day. It could not have been long after.

Q. When were you street commissioner after 1847?

A. Up to January, 1850.

Q. Did you receive the direction of the committee on lands and places with reference to making this alteration?

27 A. I received the notice from the clerk of the common council. I think I spoke to one or two of the committee, and they said I knew all about it, and to do it as I thought best. I never had any complaint made about it after that, consequently I presume it was done right.

Cross-examined.

Q. What was the form of the southern extremity of the park prior to your making this change under the resolution of the common council?

A. I have employed a city surveyor, and he has got a map, which I presume is correct.

Q. Was it a square or a curve?

A. It was a straight line with a curve where it met the line of the street.

Q. You say this stump was previously within the line of the park?

A. I have an indistinct recollection that there were one or two trees that we threw out.

Q. How many feet did you take off the extremity of that park?

A. About 20 feet as near as I can recollect.

Q. by the court. Was there a street passing through Park Row to Broadway, and past this spot before you changed the park?

A. That has been so since I recollect.

Q. So that when you threw out into the street a portion of the park
28 you widened a street that was already in existence?

A. Yes, sir.

The plaintiff's counsel then called, as a witness in his behalf, John J. Serrell, who, being duly sworn, testified:

Q. You are the city surveyor ?

A. I am.

Q. How long have you been such ?

A. A little over 26 years.

Q. You know this park ?

A. Yes, sir.

Q. How long have you known it?

A. About 30 years.

Q. You knew it before it was altered by Mr. Thompson ?

A. Yes, sir.

Q. You knew this park before it was altered, as stated by Mr. Thompson?

A. I did.

Q. And the lower end of the park was a square curve ?

A. It was a square front.

Q. Park Row and Broadway came down just as they come down now?

A. Yes.

29 Q. The lower end was square, and this street here (referring to map) was open at that time?

A. Yes.

Q. And this has been pushed back that way?

A. Yes.

Q. So that the effect of the alteration was merely to enlarge the street?

A. To enlarge the space between Chatham street on one side and Broadway on this other.

Q. During all the time you have known the park who has managed, controlled, and used it?

A. I have never known of any one, only the mayor, aldermen, and commonalty.

Q. You have been a long time connected with the city?

A. Since 1835.

Q. You have frequently had occasion to examine titles to the land which they own?

A. Yes.

Q. You made an investigation in regard to the title to this park?

A. Not to the park in particular, but to the property in general.

Q. I mean to the lands within which that would be embraced.

30 A. Yes, sir.

Q. Where does the title of that corporation come from?

A. In all the compilations that I have made that has been always claimed as belonging to the city under the charter. The most ancient maps that we have show it as part of the common lands of the city.

Q. This map was made by you for the corporation?

A. Yes, sir.

Q. And you made the survey?

A. Yes, sir.

Q. State to the jury the distance from the edge of the curve to the railing at the point where that stump is.

A. Eighteen feet.

Q. And you have marked in this diagram where that stump was?

A. I have marked where a stump is.

Q. It is in the ground now?

A. Yes, sir; I saw it there a few moments ago during the recess, and cut a piece off it.

Q. There is another stump there?

A. That is close up to the gate of the park.

Q. Tell me the distance between the stump and the edge of the curve.

A. Eighteen inches from the middle of the stump to the edge of the curve.

31 Q. And what is the distance from the centre of the stump to the edge of the stump?

A. It varies from eight to ten inches in diameter.

Q. Then it would be from 4 to 5 inches from the centre of the stump to the edge of the stump?

A. Yes, sir; as it is cut off at present level with the sidewalk.

Q. When you made this map on the 14th of Dec'r, 1861, the stump was there then?

A. Yes, sir; there was a stump there then.

Q. Describe that stump to the jury as near as you can.

A. As I remarked before, it was about 8 or 10 inches diameter at the base and about 6 inches from the ground, as it has been described by one or two witnesses in my hearing.

Q. Is that the first time you saw the stump?

A. To notice it particularly, it was—in Dec'r, 1861.

Cross-examined.

Q. During all the time that you have known this park to what purposes has it been devoted?

A. As a place of recreation, as other grounds are.

Q. And for the purpose of justices having court-houses?

A. Oh, yes.

32 Q. (Handing maps to witness.) Look at these maps and show where the southernmost part of the park was prior to the change, and where it is now, and the number of feet that was taken off.

A. My surveys shows me where the railing is now. This one I believe to have been made by Mr. Smith, shows where the railing went originally and agrees with what Mr. Thompson said just now—that there had been about twenty feet cut off.

Q. by the court. You say that there was a railing there prior to the alteration testified to by Mr. Thompson?

A. Yes, sir.

Q. Was there a sidewalk there?

A. Yes, sir.

Q. This has been cut off and the sidewalk placed around it?

A. Yes, sir.

Q. Before they would come up the sidewalk here, and now it comes up there?

A. Yes.

Q. It operates as an enlargement of the space given to the public to travel in?

A. Yes, sir.

Q. State to the court and jury how near the nearest lamp is to the stump which is designated by the gentlemen here as the place where this accident happened.

33 A. There is and was in December, 1861, when I made this survey, a lamp standing in a northwesterly direction, just inside the curbstone, 14 feet from the centre of the stump to the centre of the lamp-post.

Q. Was there a gas-burner inside of it?

A. Yes.

Q. How high was the flame of this gas-burner from the ground?

A. Nine feet and four inches.

Q. That was on the inside of the curve?

A. Yes.

Q. In a west-northwest direction from this stump?

A. Yes.

Q. State the next nearest street lamp to that stump.

A. There is a lamp almost due east of the stump and forty-five feet distant from it.

Q. From the centre of the stump to the centre of the lamp-post?

A. Almost due east.

Q. Where does that stand?

A. On the same sidewalk, just inside the curbstone and towards the express office. That is the next nearest.

Q. State the next nearest lamp.

34 A. Without using my scale I can hardly tell the next nearest. There is one on the sidewalk of Broadway, where it commences creeping round towards the stump, and that is 70 feet from it and bears about north-northwest from it.

Q. The next lamp.

A. There are several which will range very nearly the same distance. There are three upon the opposite side of Park Row.

Q. The front of whose houses?

A. There is one in front of No. 11, one in front of No. 15, one on the line between 19 and 21. The distance of those lights from the east side of Park Row to this stump varies from about 75 feet to 95 feet. Some of them are about 75 feet, and the furthest about 95.

Q. How many lamps within a radius of one hundred feet are shown by the map?

A. Six lamps within a radius of 100 feet.

Q. How many lamps are there in the Astor House?

A. There are two; one on each side of the door.

Q. Do you know how many burners are in those lamps?

A. They are four-burner lamps.

Q. How many burners have these various street lamp of which you have spoken?

A. Single burners.

Q. Do you know how frequently cars of 3d and 4th avenue line of cars come to the terminus opposite to the Astor House?

35 A. I do not. I find them there when I want them. The 3d avenue cars run about every two minutes, and the 4th avenue cars about every numbers apart.

Q. They are continually arriving and departing?

A. Yes, sir; with very little intermission.

Q. How many lights are there in those cars at night?

A. There are two lights in each car at night.

Q. Did you pass by the Astor House in the winter of 1859, or thereabouts?

A. I have no doubt I did, a great many times.

Q. Can you tell whether Barnum's Museum were lit up on those evenings?

A. It is usually is.

Q. Do you know how many openings there are on Barnum's Museum?

A. I have seen it so usually.

Q. Do you know of any house right opposite this stump, on the eastern line of Park Row, where they keep open at 6 o'clock at night or near that time

A. Yes, sir; I have frequently seen them. I don't remember the extent of the lighting in winter time.

Q. Do you recollect whether it was the custom of the city during the winter of 1859 to light up the street lamps at dark with gas?

(Objected to; allowed; exception.)

A. I do not know that it was lighted on that night.

36 Q. What is the custom with reference to lighting the gas lamps of this city during the night—at what time of the night?

The court: You should confine it to this part of the city.

Q. I asked you whether you observed on those occasions that the lights were lit or not.

A. I believe it has been usually the case, when I left my office, in Nassau street, on winter evenings to go up town, to find the lamps lighted as I went up, and I usually stay around my office until I cannot see to write any longer. I seldom write by candle light. And that winter I was living in St. John's Square, and in the habit of passing there, and I don't remember that I saw the street dark at any time.

Q. What is the nearest part at which these rails are to the present curb?

A. I have not measured it, but I should suppose, if you are willing to take my supposition, it to be about 7 feet. There is room for one cart to pass between the track and the curbstone. I think there is about 7 feet between the rail and the curb. I do not pretend to say that this map, so far as the delineation of the Third and Fourth avenue railways are concerned——

Q. How far is the distance?

37 A. I believe that to be about seven feet. Between those rails is four feet and eight inches; and if it was be put down on this scale so small, it would appear smaller than it is. Between that rail and the curb I believe to be about seven feet, for I frequently see carts passing between the rail and the curb.

Q. The whole of the space now occupied by the depot, at the southern extremity of the entrance to the park, was anterior to 1847, within the park?

A It was a part of the park prior to that time, according to my recollection, and according to these maps after comparing them.

Q. I understand you that from the middle of the stump to the extreme southern end of the curve is 18 inches?

A. Yes, sir.

Q. From the outside of the stump to the extreme edge of the curve is how far?

A. From 12 to 14 inches.

Redirect.

Q. What is the distance from those lights on the east side of Park Row to this stump?

A. I answered just now that they varied from seventy-five to ninety-five feet.

38 Q. What is the distance from this stump to the Astor House light?

A. About 125 to 130 feet.

Q. What is the distance from Barnum's Museum to this stump?

A. Well, from the rounding part of Barnum's Museum, on Ann street and Park Row front, to the stump is about 200 feet; some of them a little less, some of them a little more; that is, taking the average of them.

Q. Do you recollect whether you were in New York in Dec., 1859?

A. I know that I was not absent from it more than one or two days the whole of that winter.

Q. You don't mean to say that that custom, in regard to those lamps being lighted, was always followed?

A. When I passed up about dark I either saw the lamps lighted or in process of lighting. I might not have noticed them if they had not been lit.

Q. You only speak of this custom as a general thing?
A. I believe it is a general custom.

Recross.

Q. What is the grade of the sidewalk where the stump is?
A. 18 feet from the edge of the curbstone to the park railings.

39 [Here follows map, page 39.]

40 It was admitted that an adjustment of the plaintiff's claim was duly demanded of the comptroller, which was refused.

It was further admitted that the corporation were in funds sufficient to make all necessary repairs to the streets and to keep them in order.

The plaintiff here rested.

The defendants' counsel then called as a witness Edwin Smith, who, being duly sworn, testified as follows:

Q. What is your profession, and where do you reside?
A. I am one of the city surveyors of the city of New York, and reside in the city.
Q. Do you recollect of having made a survey of any portion of the City Hall Park in 1847 or 1848?
A. Yes, sir.
Q. At whose instance did you make such survey?
A. Under the direction of the then street commissioner.
Q. Who was the then street commissioner?
A. Martin E. Thompson.
Q. Do you recollect the date at which you made this survey?
41 A. Not positively, sir; somewhere about—I think it was in the fall of 1847. That is my impression.
Q. Were you specially deputed to the performance of that task?
A. I was.
Q. Do you recollect the resolution under which you, as city surveyor, undertook to make that survey?
A. I recollect it in general terms.
Q. (Handing resolution of November 18, 1847, to witness.) Do you remember that resolution?
A. Yes, sir; I remember that.
Q. Was it under that resolution that you proceeded to make that survey?
A. It was.
Q. Under that resolution did you make a survey?
A. I did.
Q. For the purposes of what? Of carrying out the resolution?
A. For the purpose of carrying out the resolution, as I understood it at the time.
Q. (Handing paper to witness.) What is this survey paper?

[Here follows map, page 41.]

42 A. That is the survey which was made, and the plan under which the alteration was made.
Q. By whom was it made?
A. By myself.
Q. How many feet did you take off on the Broadway side of the park to the extreme distance on Park Row, and how much did you curtail, if any, the dimensions of the southerly boundary of the park?

A. The alteration was made so as to recede the railing 20 feet from where it stood at the southerly end of the park, throwing twenty feet into the street.

Q. How many feet and inches?

A. Just 20 feet at that point. On the line of Broadway there was forty eight feet and nine inches.

Q. How many feet on Park Row, and how many on Broadway—the extreme number of feet?

A. Forty-eight feet and nine inches.

Q. Do you mean in the circle?

A. No, sir.

The court. Am I right in understanding the words "Park Row" to apply to the street?

A. Yes, sir; the street running on each side.

Q. Could the southerly boundaries of the park have been curved without throwing into it the amount of feet that you have just now stated?

A. That would depend altogether upon the radius of the curve that you would require.

43 Q. Suppose that the extreme end of the curve had met the southerly apex of the park—that would be the point where the outer circle would have reached to make that curve—could it not have been done in that way?

A. Oh! yes, sir; that could have been done.

Q. by plaintiff's counsel. That is, you could have made the curve without cutting off so much of the park?

A. Yes, sir.

Q. It was not necessary to make that curve?

A. No more than as I acted under the direction of the committee on street commissioners.

Q. I suppose you acted under instructions?

A. Yes, sir.

Q. Do you know if there is any ascent between the height of the curve at the southerly end of the park and the place where it meets the rails? You take the curve due south from the end above. Is there any ascent between this point and the curve? Does the ground ascend? And if so, how much?

A. I think it does. I think there is a regular ascent required by law in the sidewalk; there was at the time the work was completed.

Q. From your reflection how much is that?

44 A. Two inches on ten feet; that is, on the sidewalk from the curbstone to the copeing of the walk.

Q. Do you know the height of the curve at the southerly end of the park?

A. Not at present. I know that it was when I left the work.

Q. What was it then?

A. It was 10 inches from the face of the gutter to the top of the curve.

Cross-examined.

Q. Was the sidewalk paved when you left it?

A. Yes, sir; all flagged.

Q. Do you recollect when the barracks which now fill the park were put up?

A. It was soon after the breaking out of the war.

Q. Was it not in the summer of 1861 when the troops commenced going through here?

A. I think it was in June, 1861.

The defendants then called as a witness Cornelius L. Everett, who, being duly sworn, testified as follows:

Q. What is your occupation?

45 A. Vice-president of the New York Gas-light Co.

Q. How long have you been vice-president of the New York Gas-light Co.?

A. A little over two years.

Q. And were you connected with that institution before that time?

A. Yes, sir; many years.

Q. What was the capacity in which you were connected with it?

A. Secretary for 18 years.

Q. Was there any contract in existence with the gas-light co. between the corporation and the gas company in the year 1859?

A. We were acting under an expired contract by direction of the superintendant.

Q. Have you that contract with you?

A. I have not, but there is a copy of it recorded in the lamp and gas office.

(The defendant's counsel proposed to show that the company had a contract with the corporation to light the streets. Allowed.)

Q. The gas company had a contract with the corporation to light the streets in 1859?

A. Yes, sir.

Cross-examined.

46 Q. Who lights the lights, the gas company's men or the employees of the corporation?

A. The gas company's lamp-lighters, under the direction of the corporation.

Q. They get their orders from the superintendent of lamps and gas?

A. Yes, sir.

Q And he is an officer of the city corporation?

A. Yes, sir.

Redirect.

Q. Did you know a lamp-lighter of the name of Hyde?

A. I did.

Q. Was he a lamp-lighter of the district comprising the southerly portion of the park?

A. Yes, sir; he lit the park lamps.

Q. What has become of him?

A. He died about a year since or thereabouts.

Recross.

Q. Did he light the lights outside of the park?

A. I think he lighted them on the outside of the park as well as the inside.

47 The defendants' counsel then offered in evidence certain maps of the city of New York showing the boundaries and space set apart for the City Hall Park.

The plaintiff's counsel objected, and the court sustained the objection, and the defendant's counsel duly excepted.

The testimony here closed.

The defendants' counsel then asked the court to charge the following propositions of law:

1st. That the defendants are not liable in this action, the plaintiff having failed to establish any absolute duty upon their part to keep the space where the stump was situated free from obstructions.

The court refused so to charge, and the defendants' counsel duly excepted.

2d. That the defendants as commissioners of highways are not liable in a private action for a neglect to repair, the remedy being by indictment.

The court refused so to charge, and the defendants' counsel duly excepted.

48 3d. That the resolution of the common council of November 18, 1857, did not authorize the act of the street commissioner in devoting the space occupied by and surrounding the stump to the uses of the public as a highway.

The court refused so to charge, and the defendants' counsel duly excepted.

4th. That the defendants are not liable to an action by reason of an alleged neglect upon their part to remove an obstructionin a public street.

The court refused so to charge, and the defendants' counsel duly excepted.

5th. That the defendants are not liable to the plaintiff by reason of an unauthorized act of the street commissioner.

The court refused so to charge, and the defendants' counsel duly excepted.

6th. That the defendants, under their charter, had no power to authorize the taking of a portion of a public park and to devote the same to the uses of a public highway, a street, by a resolution of the common council.

49 The court refused so to charge, and the defendants' counsel duly excepted.

7th. That the space taken by the street commissioner belonged to the defendants, and was by them held in trust for the uses of a park, and did not become a public highway by reason of the said resolution and the act of the said commissioner.

The court refused so to charge, and the defendants' counsel duly excepted.

8th. That if the said space, by the act of the street commissioner, became a part of the public highway, and the stump was then upon it, there was no obligation upon the defendants to remove the same, the public being presumed to have taken it with notice of the obstruction.

The court refused so to charge, and the defendants' counsel duly excepted.

9th. That the defendants are not liable unless they had express notice of the obstruction.

The court refused so to charge, and the defendants' counsel duly excepted.

10th. That the defendants not having legally dedicated the said space for
the uses of a public highway, had a right to reclaim the same at any
50 time within twenty years.

The court refused so to charge, and the defendants' counsel duly excepted.

11th. That the defendants are not estopped by reason of the uses of the space as a public highway from setting up their exemption from liability on the ground that the same was not a public highway.

The court refused so to find, and the defendants' counsel duly excepted.

12th. That the plaintiff has failed to show any funds in the possession or under the control of the defendants with which to make the necessary repairs, or to keep the same free from an obstruction, by reason of which said obstruction the plaintiff claims to have sustained an injury.

The court refused so to charge, and the defendants' counsel duly excepted.

51 His honor then charged the jury as follows:

GENTLEMEN OF THE JURY: This case, as you have already learned, depends mainly and in the first instance upon the general question whether or not the defendants, the corporation of this city, have been guilty of negligence in leaving the obstruction on the sidewalk at the foot of the park, which it is alleged occasioned the injury to the plaintiff that has been shown by the testimony. That is the general question. There is no controversy as to the fact of the injury, or the extent. Beyond all doubt it was a most serious one.

The point in the case is, who is responsible for it? Now, the defendants, the corporate authorities, by virtue of their charter and of the laws, have the charge and control of the streets and sidewalks within the corporate limits, and they are bound to keep them in good and safe condition. If they leave an opening in the sidewalk, which is sometimes done, and a person coming along in the night falls into it, without any want of proper care on his part, the defendants are liable for any injury that may be occasioned. So, if an obstruction on the face of the sidewalk, over which a person stumbles—boxes, if you please, left out on the sidewalk on a dark night, 52 or barrels, over which a person stumbles and falls, the absence of want of care on his part, the defendants are equally liable for the injury. The opening in the one case and the obstruction in the other constitute the negligence, are evidence of negligence on the part of the authorities who have the control of the matter, and in order to escape from the charge of liability, the burthen is thrown upon them to disprove the negligence.

It is true, as is contended for on the part of the counsel for the corporation, that if the plaintiff in this class of cases has been himself guilty of negligence, and which materially contributed to the injury, then he cannot recover, even if the defendants have been shown to be also guilty of negligence. The plaintiff must be free from fault.

Now, gentlemen, applying these principles which I have laid down to you to the evidence in the case, it will be for you to say in the first place whether or not there was any negligence on the part of the plaintiff, and if not, whether or not there was negligence on the part of the defendants. If there was, and none on the part of the plaintiff, the next question, and which is 53 a very important one in all these cases, arising out of the measure of damages to which the party is entitled, of course the actual expense of the plaintiff, which he has sustained on account of the injury, is a plain item. No difficulty about that. In this case the expense in this city and the expense added to it in Newport, Rhode Island, after Mr. Sheffield was enabled to be removed home, amounts to $3,600 or $3,700 money out. Another item is the loss of his time and of the fruits of his labor or services during the period of his disability. This depends upon a consideration of his occupation in life and the extent of his business and the amount of compensation. For this item of loss will depend upon the exercise of a sound discretion and judgment and reflection on the part of the jury. You can only approximate to any loss that the party has sustained by means of being deprived of following his occupation or profession. Indeed, the question necessarily depends somewhat upon speculation. Still it is an item properly presented and is entitled to the consideration of the jury, and to an allowance of such sum as in their best judgment they think he might have made, or, in other words, which he actually lost by his disability.

There is also another item. The pain and suffering of the body and 54 mind occasioned by the injury. This is a very difficult question to deal with, and calls for great care and caution, as the point appeals to our sympathies, to our feelings, and which, unless carefully watched and guarded, may mislead the judgment. It is an exceedingly difficult proposition to compensate in hand money the sufferings of the body or of the mind. There is no rule by which to arrive at any result proportioned to the degree of pain or the degree of suffering. No doubt in this case but the sufferings of the plaintiff were great, very great, and of long endurance, and I agree that notwithstanding the difficulties that encompass this item of damages, that it is an item of damages which the jury must look at, but it should be with caution, with deliberation, and almost with fear, lest your feelings may get the better of your judgment and render an unreasonable verdict.

There is one other item of damages: the permanent injury sustained by the plaintiff. This is a more substantial ground of damages than the one to which I have just referred. Still it is a wide question, difficult to deal with, depending upon, in some respects, speculation, conjecture, upon a consideration of the extent of the permanent disability, both as to the present disability and its duration. Both must be taken into the account, and
55 all I can say to you upon this branch of the case is to repeat what I
have just stated to you: it requires care, reflection, judgment, deliberation, cool heads.

Now, in reviewing these items of damages, first, actual damage; next, the loss of time; next, pain and suffering; next, permanent injury, give the exercise of your best judgment and soundest deliberation to arrive at such a sum, if you find in favor of the plaintiff, as upon the whole will give to him a fair and reasonable indemnity for the injury he has sustained and the loss he has suffered by reason of it.

One word as to another subject. This case, as stated by the learned counsel, has been tried once, and the jury, it seems, were unable to agree. We hope and trust that upon this second trial you will be able to dispose of it satisfactorily to all of you, and that you will seek to reconcile and harmonize any discordant opinions, any diversity of opinion upon a subject which is so indefinite in many of its aspects, so difficult to bring two minds to agree upon it under any circumstances. We hope that you will make an effort to reconcile and harmonize any discordant opinions and finally close this case by rendering a verdict.

56 To the instructions given by the court to the jury, that the corporation of the city of New York were bound to keep the streets and sidewalks within the corporate limits in good and safe condition, the counsel for the defendants then and there duly excepted.

The counsel for the defendants excepted in like manner to the following instruction given by the court to the jury: "If an obstruction on the face of the sidewalk, on which a person stumbles—boxes, if you please, left out on the sidewalk on a dark night, or barrels over which a person stumbles and falls, in the absence of want of care on his part the defendants are equally liable for the injury."

The counsel for the defendants, in like manner, excepted to the instruction given by the court to the jury that the obstruction of the street or sidewalk was evidence of negligence on the part of the defendants.

The counsel for the defendants in like manner excepted to the instruction given by the court to the jury that in order to escape from liability where the obstruction existed, the burthen was thrown upon the defendants to disprove it.

57 And the said circuit judge, under the charge and with the directions aforesaid, left the aforesaid issues and the evidence so given on the trial thereof as aforesaid to the said jury, and the jury aforesaid then and there gave their verdict for said plaintiff and ten thousand dollars damages.

And inasmuch as the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the action aforesaid, and also the said exceptions so offered and made to the opinion and decision of the said circuit judge do not appear by the record of the verdict aforesaid or of the said trial, the said counsel for the defendants did then and there propose their aforesaid exceptions to the opinion and instructions of the said circuit judge, and requested him to put his seal to this bill of exceptions according to the statute in such case made and provided. And thereupon the said circuit judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the statute in such case made and provided on the day of in the year eighteen hundred and sixty-four.

S. NELSON.

58 Endorsed: U. S. circuit court. William P. Sheffield *vs.* the Mayor, aldermen, and commonalty of the city of New York. Bill of exceptions. Filed Nov. 17, 1864.

59 Circuit court of the United States of America for the southern district of New York, in the second circuit.

WILLIAM P. SHEFFIELD
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY of New York. } Bond for cost.

Know all men by these presents that we, the mayor, aldermen, and commonalty of the city of New York, defendants, and Charles G. Cornell, street commissioner of the city of New York, and Terence Farley, of the said city, sureties are held and firmly bound unto the above-named William P. Sheffield in the sum of twelve thousand dollars, to be paid to the said Sheffield, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated
60 the eleventh day of December, in the year of our Lord one thousand eight hundred and sixty-three.

Whereas the above-named the mayor, aldermen, and commonalty of the city of New York has prosecuted a writ of error to the Supreme Court of the United States *of the United States*, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named, the mayor, aldermen, and commonalty of the city of New York shall prosecute the said writ of error, to effect and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

GEORGE OPDYKE, *Mayor*. [L. S.]
CHAS. G. CORNELL. [L. S.]
TERENCE FARLEY. [L. S.]

Sealed and delivered in presence of—
G. W. HINCHMAN.

61 I hereby approve of the form and sufficiency of the preceding bond. By the c. council.

[L. S.] D. T. VALENTINE, *Cl'k C. C.*

UNITED STATES OF AMERICA, *State of New York, ss:*

I, George W. Hinchman, notary public in and for the State of New York by letters patents under the great seal of said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify that the foregoing bond on writ of error was signed by the parties thereto, and George Opdyke, mayor of the city of New York, and that they each that he was severally worth the sum of twenty-four thousand dollars over and above all his just debts and liabilities.

In witness whereof, I have subscribed my name and caused my notarial seal of office to be hereunto affixed the eleventh day of December, 1863.

[L. S.] GEORGE W. HINCHMAN,
62 *Notary Public City and State of New York.*

UNITED STATES OF AMERICA, *State of New York:*

I, George W. Hinchman, notary public in and for the State of New York by letters patent under the great seal of said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify that David T. Valentine, of said city, being by me sworn, did depose and say that he is clerk of the common council of the city of New York; that the seal hereto affixed is the official seal of the city of New York, and was so affixed by their authority.

In witness whereof, I have subscribed my name and caused my notarial seal of office to be hereunto affixed the eleventh day of December, 1863.

[L. S.] G. W. HINCHMAN,
Notary Public City and State of New York.

63 I approve the sureties of the foregoing bond as abundantly good and sufficient. WM. D. SHIPMAN, *Judge.*

Endorsed: U. S. circuit court, south'n dist. of New York. W. P. Sheffield *v.* the Mayor, &c., of the city of New York. Bond. Filed Dec. 17, 1863.

64 By the Honorable William D. Shipman, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, to William P. Sheffield:

Whereas there has lately issued out of the Supreme Court of the United States a writ of error directed to the judge of the circuit court of the United States for the southern district of New York, in the second circuit, stating that in the record and proceedings, as also in the rendition of the judgment, of a plea in the said court before the judge thereof, between William P. Sheffield, plaintiff, and the mayor, aldermen, and commonalty of the city of New York, defendants, a manifest error hath happened to the great damage of the said the Mayor, Aldermen, and commonalty of the city of New York; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the first Monday of December next:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 15th day of December, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

WM. D. SHIPMAN, *Judge.*

65 CITY AND COUNTY OF NEW YORK, *ss:*

Samuel A. Bogardus, being duly sworn, says that on the 17th day of Dec'r, 1863, at the city of New York, he served the within citation on Thomas Vernon, esq., the attorney of the plaintiff, by leaving a true copy thereof with a person in charge of said attorney's office during the absence of said attorney therefrom. SAM'L A. BOGARDUS.

Sworn to before me this 18 day of Dec., 1863.

JOHN K. HACKETT,
Notary Public City of New York.

Endorsed: Circuit court, so. dist. of New York. William P. Sheffield *v.* the Mayor, &c., of the city of New York. Citation. Filed Dec. 17, 1863.

Filed December 8, 1864.

REC. 214—4

Supreme Court of the United States.

WASHINGTON, SS.

In the Case,
THE MAYOR, &c., OF THE CITY OF NEW YORK, PLAINTIFFS IN ERROR,
vs.
WILLIAM P. SHEFFIELD.

DEFENDANT'S BRIEF.

The charge to the jury was, " That the corporate authority of New York, by virtue of their charter and of the laws, have the charge and control of the streets and sidewalks within the corporate limits, and they are bound to keep them in good and safe condition. If they ~~have~~ leave an opening in the sidewalk, as is sometimes done, and a person coming along in the night falls into it, without any want of proper care on his part, the defendants are liable for any injury that may be occasioned. So if an obstruction on the face of the sidewalk, over which a person stumbles—boxes, if you please—left out on the sidewalk on a dark night, or barrels, over which a person stumbles and falls, the absence of the want of care on his part, the defendants are equally liable for the injury. The opening in the one case and the obstruction in the other constitute the negligence, are evidence of negligence on the part of the authorities who have the control of the matter, and in order to escape from the charge of liability, the burthen is thrown upon them to disprove negligence. * * * * * * * *

" If the plaintiff in this class of cases has been himself guilty of negligence, and which materially contributed to the injury, then he cannot recover, even if the defendants have been shown to be guilty of negligence. The plaintiff must be free from fault."

The points in the charge of the presiding judge to which the plaintiffs in error except, are,

I. That the corporation of the City of New York were bound to keep the streets and sidewalks within the corporate limits in good and safe condition.

II. If the city authorities leave an obstruction on the face of the sidewalk, on which a person stumbles—boxes, if you please, left out on the sidewalk on a dark night, or barrels over which a person stumbles and falls, in the absence of want of care on his part, the defendants are liable for the injury.

III. That the obstruction of the street or sidewalk was evidence of negligence on the part of the defendants.

IV. That in order to escape from liability when the obstruction existed, the burthen was thrown upon the defendants to disprove it.

The City of New York, by accepting their charters, became, by the conditions thereof, bound to keep the public streets within the city in repair, and as a consideration for this they received, by force and virtue of such charters, grants of valuable property, privileges and franchises. (See Charters of 1686, 1708, 1730; Amended Charters of 1830, 1849, 1853 and 1857,) Having acted under, claimed and enjoyed the benefit of these charters, the defendants are bound by their conditions; and if they fail to perform them, are liable for such special damage as any person may sustain by reason thereof.

II. The corporation is liable because it is its duty to keep and maintain the streets of the city in repair, and for this purpose they are empowered to raise sufficient funds and to employ all necessary officers and servants. If, in consequence of neglect of this duty, any person suffers special damage, he is entitled to the usual common law remedies for the recovery thereof.

The plaintiffs in error were commissioners of highways for the City of New York—made such by act of March 21st, 1787—and, as such commissioners, have the care of the highways within the corporate limits of the City of New York, and are subjected to the duty of keeping them in repair. (See Rev. Stat. New York, vol. ii, chap. 16, p. 381, § 1.)

When individuals or corporations have fixed and certain duties assigned them of a mere ministerial character, and the means placed at their disposal are sufficient for their performance, they are under obligations to perform them at the risk of being made to answer for the consequences of their neglect. (See Hutsen *v.* City of New York, 5 Sandf. 289; Rochester White Lead Co. *v.* Rochester, 3 Comst. 463.)

In Hutson and wife *v.* The Mayor, &c , of New York, 5 Selden, 163,

The Court of Appeals of the State of New York held, that "The corporation of the City of New York is bound to keep the streets and avenues of that city, which are opened for public use, in such repair that they may be safely travelled; and when they are negligently suffered to become and remain out of repair, the corporation is liable for injuries sustained by persons through such negligence." That, "Where a public body is clothed by statute with power to do an act which the public interests require to be done, and the means for the performance are placed at its disposal, the execution of the power may be insisted on as a duty, although the statute conferring it is only permissive in its terms."

This same principle was affirmed in the case, (*The Mayor, &c., of the City of New York* v. ~~*Forge*~~, 3 *Hill*, 612) This

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was where an individual had been injured by the neglect of the corporate authorities to repair a sewer. The same court recognized the same principle in the case, (*The Rochester White Lead Co.* v. *The City of Rochester*, 3 *Comst.* 464.) This was a case for negligence in the construction of a culvert, and in this case the court say, "when a duty purely ministerial is violated or negligently performed by a municipal corporation, the party aggrieved may have redress by action."

These cases were afterwards affirmed in the same court in the case of *Conrad* v. *The Trustees of the Village of Ithica*, 16 *New York*, 158, and in the case of *Hickok* v. *The Trustees of the Village of Plattsburg* and *West* v. *The Trustees of the Village of Brockport*, reported in a note to the case of Conrad *v.* Trustees of Ithica, 16 N. Y. 161. (See, also, Smith *v.* Wright, 24 Barb. 170; Wightman *v.* Corporation of Washington, 1 Black. 49. See, also, Angell & Durfee on Highways, § 300.)

In order to get at the practical question presented by the other three exceptions to the charge, it becomes material to be informed of the facts to which the alleged erroneous charge was to be applied.

In November, A. D. 1847, the Assistants and Aldermen, with the concurrence of the Mayor of the City of New York, authorized the committee on lands and places, with the street commissioner, to adjust the lower corner line of the Park, so as to make a curve, instead of corners and angles, from Broadway to Park Row, and to place the railing on the line of such curve (p. 8–25). This park was the property of the corporation. (See Ev. of Serell, p. 10–30.) This authority was soon executed by the street commissioner and committee. (See Ev. M. E. Thompson, p. 9–22, and Ev. Serell, p. 14–41.) The rounding of the lower end of the Park and the changing of the railing widened Park Row and Broadway at the apex of the Park. (See Id. p. 9–28, and Seely Ev. p. 10–28.) This obstruction complained of was then left by the street commissioner above the surface of the sidewalk, (see Id. p. 8, 24; do. 9, 27; Seeley Ev. pp. 10 and 11, point 30 and

31; Carter Ev. p. 6–19; H. N. Thompson Ev. 7–21,) and consisted of the stump of a tree from 14 to 18 inches within the curb, on the sidewalk, from 6 to 8 inches in height, and from 8 to 10 inches in diameter. (See Seely Ev. p. 11–31; H. N. Thompson Ev. p. 7–21; Carter, p. 6–19.) A sidewalk was immediately laid over the piece of land segregated from the Park. (See Seely Ev. p. 11, 32; M. E. Thompson, p. 9–26.)

Did the injury occur within the limits of a public highway?

It occurred near the southern extremity of the Park, on the sidewalk 14 inches within the curb. (See Ev. H. N. Thompson, p. 7–21; plat by Serell, of Dec. 14, 1861.)

Park Row, an ancient street, extends up the east side of the Park, and Broadway, another ancient street, extends up the west side of the Park. Under the resolution of the city council of November 18, 1847, the lower end of the Park, at the junction of these streets, was rounded and some twenty feet cut off from the Park and thrown into the streets. This was done by the street commissioner, under the direction of the committee of the council. (See Ev. M. E. Thompson, pp. 8 and 9–24, 26, 27, 28; Ev. Serell, p. 11–32.) This sidewalk was then constructed and the parcel of land thus thrown out has since been used as a part of the public highways to which it was opened. (See Ev. Thompson, p. 9–26.)

The resolution under which the end of the Park was taken off was as follows, to wit:

"*Resolved*, That the committee on lands and plans, together with the street commissioner, be authorized to adjust the lower corner line of the Park so as to make a curve, instead of corners and angles, from Broadway to Chatham street, and placing the railing on line of such curve."

This accident occurred December 16th, 1859, twelve years after the throwing out of the land.

The city were the owners of the Park. (See Ev. of Serell, p. 10–30.) There is no evidence in the case to qualify or limit their title thereto, but the evidence of Thompson confirms that of Serell.

The municipal authority of the corporation might well dispose of the lands of the city, and especially, when they may lay out highways, may those authorities appropriate the lands of the city, in proper cases, to widening the public thoroughfares. And it will not be said that the appropriation of the lands of the city to the widening of Broadway and Chatham street was not a proper appropriation of this land.

There is nothing in the law better settled than that the proprietor of lands may dedicate them to the public for a public highway. See Rex *v.* Hudson, 2 Strange, 909.

The Trustees of Rugby Charity *v.* Merryweather, 11 East. 375, quoted by Chancellor Kent in 3 Kent's Com. Am. Law, p. 450, in which Lord Kenyon is quoted as saying, that "eight years from use of a way by the public, with permission of the owner, was deemed quite sufficient time for presuming a dereliction of the way to the public; and Lord Kenyon referred to a case in which six years had been held sufficient." Chancellor Kent says, that "if there were clear, unequivocal acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment of the road, those acts would be sufficient to establish the dedication without any intermediate period." (See Ib. p. 451.) This subject of acquiring highways by dedication has often been before the courts of New York. See Watertorn *v.* Cowen, 4 Paige, 410; In the matter of Thirty-second Street, 19 Wend. 128; Thirty-ninth Street, 1 Hill, 191; Ward *v.* Davis, 3 Sandf. 502; Drury *v.* Roome, 6 Ward. 651.

In Hobbs *v.* Lowell, 19 Pick. p. 409, Chief Justice Shaw, delivering the opinion of the Supreme Court of Massachusetts, says, "No particular time is necessary for evidence of dedication; it is not like a grant presumed from length of time; if the act of dedication be unequivocal it may take place immediately." The opinion in this case goes over the whole subject, and the doctrine is discussed with great ability.

The question is not a new one in this court, for it passed in judgment in the cases of Cincinnati *v.* White, 6 Pet. 431;

New Orleans *v.* United States, 10 Pet. 662, 712; Barclay *v.* Howell, 6 Pet. 498, 504.

The whole subject is discussed and the authorities are considered in Washburn on Easements, pp. 128–157.

It should be borne in mind that the alleged obstruction was created by the street commissioner, acting with a committee of the city council, by cutting down a tree and leaving the stump in, and projecting above, the sidewalk.

As the corporation could not require notice of an act done by its own officers, this took out of the case all questions in reference to notice of the existence of the obstruction and relieved this part of it of some other extrinsic questions.

The naked question to be decided by the court and jury was, whether the leaving a stump from six to eight inches high, four within the curb on the sidewalk, at the junction o and Park Row in New York, made the street ravellers? For if the officers of the city left the ob the street which made it unsafe, the obstruction ce of their negligence.

Then, if jury found that the street was not safe and convenient for use at this place, and that the plaintiff below received the alleged injury in consequence of the defect in the street, they were left to inquire whether the want of care, or the negligence of said plaintiff contributed to the injury; and upon these issues they returned a verdict against the corporation.

The learned judge, in his charge, was dealing with a practical, and not an ideal case; if the law, which he gave in charge, was correct in its application to a case where the street was rendered unsafe by the city authorities, it obviated the necessity for the plaintiff below of offering evidence of notice to the corporation, as the corporation were bound to take notice of a defect in a way created by its own officers.

The plaintiffs in error admitted, at the trial, "that the corporation were in funds sufficient to make all necessary repairs

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The municipal authority of the corporation might well dispose of the lands of the city, and especially, when they may lay out highways, may those authorities appropriate the lands of the city, in proper cases, to widening the public thoroughfares. And it will not be said that the appropriation of the lands of the city to the widening of Broadway and Chatham street was not a proper appropriation of this land.

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It should be borne in mind that the alleged obstruction was created by the street commissioner, acting with a committee of the city council, by cutting down a tree and leaving the stump in, and projecting above, the sidewalk.

As the corporation could not require notice of an act done by its own officers, this took out of the case all questions in reference to notice of the existence of the obstruction and relieved this part of it of some other extrinsic questions.

The naked question to be decided by the court and jury was, whether the leaving a stump from six to eight inches high, fourteen inches within the curb on the sidewalk, at the junction of Broadway and Park Row in New York, made the street unsafe for travellers? For if the officers of the city left the obstruction in the street which made it unsafe, the obstruction was evidence of their negligence.

Then, if the jury found that the street was not safe and convenient for use at this place, and that the plaintiff below received the alleged injury in consequence of the defect in the street, they were left to inquire whether the want of care, or the negligence of said plaintiff contributed to the injury; and upon these issues they returned a verdict against the corporation.

The learned judge, in his charge, was dealing with a practical, and not an ideal case; if the law, which he gave in charge, was correct in its application to a case where the street was rendered unsafe by the city authorities, it obviated the necessity for the plaintiff below of offering evidence of notice to the corporation, as the corporation were bound to take notice of a defect in a way created by its own officers.

The plaintiffs in error admitted, at the trial, "that the corporation were in funds sufficient to make all necessary repairs to the streets and to keep them in order." (See case, p. 14–40.)

Sidewalks are a part of the public streets, and as such are to be kept, like the streets themselves, in a safe and convenient state of repair through their entire width. See Angell & Durfee on Highways, §§ 260 and 263; Clapp *v.* City of Providence, 17 Howard, 167, and cases there cited.

By the act of 1854, ch. 324, § 2, 2 Rev. Stats. of N. Y. § 158, p. 409, the commissioners of highways of the several towns in the State of New York were authorized to expend a part of the highway tax upon the sidewalks in the highway districts.

By the ordinances of the City of New York, 1859, p. 241, it is provided that all streets shall have sidewalks; § 8 provides that all sidewalks shall be flagged and paved. See, also, §§ 9–14, 16 and 17. The obstruction of the sidewalks prohibited. See Id. chap. 24, p. 286, § 34. Street commissioner authorized to remove any obstruction in the streets (see Id. § 23), and to cut down and remove trees (§ 29). Wallace v. Mayor

2 Hill. 440
Abbotts P. 40

In this case the city were the owners of the Park, and made the sidewalk at its own expense and upon its own lands and in accordance with the laws of the State and its own ordinances. There is therefore a well-marked distinction between the case at bar and the case of the trustees of a village not authorized to construct a sidewalk, or between this and a case where the sidewalk was not owned and constructed by the corporation.

The cases in the 27th, 32d and 36th Barbour Sup. Court Rep. were cases decided in a court of inferior jurisdiction to the Court of Appeals, and they turned upon the construction of local statutes, differing from the statutes and ordinances applicable in this case.

W. P. SHEFFIELD, *Pro. Sc.*

Supreme Court.

OF THE UNITED STATES.

No. 127.

THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW YORK,
Plaintiffs in Error,
vs.
WILLIAM P. SHEFFIELD,
Defendant in Error.

In Error to the Circuit Court of the United States
for the Southern District of New York.

Points for Plaintiffs in Error.

RICHARD O'GORMAN,
Counsel to the Corporation of the City of New York.

NEW YORK:
EDMUND JONES & CO., PRINTERS,
No. 113 FULTON STREET.
1867.

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U. S. Supreme Court.

SUPREME COURT OF THE UNITED STATES.

The Mayor, Aldermen, and Commonalty of the City of New York,
Plaintiffs in Error,
agst.
William P. Sheffield,
Defendant in Error.

STATEMENT.

This case comes before the Court upon a writ of error to the Circuit Court for the Southern District of New York.

The action was brought by the defendant in error to recover damages for injuries received by him from stumbling over a stump at the edge of the sidewalk around the lower end of the City Hall Park, in the city of New York. The case was tried before the Honorable Samuel Nelson and a jury.

Upon the trial it appeared that on the evening of the 16th December, 1857, the defendant in error, while crossing the lower end of the City Hall Park, hit his right foot against some projection above the level of the sidewalk and broke his thigh-bone. That after this injury he was confined to his bed at the New York Hotel for one hundred days, when he was removed to his house in Newport, Rhode Island. That he wore splints on the limb until August, 1860, and was compelled to use crutches until September, 1861, and that his expenses for physicians, nurses, and board, amounted to three thousand eight hundred dollars.

Error Book, p. 6, fols. 17, 18.

It further appeared upon the trial that the stump over which the defendant in error claimed to have fallen was distant about fourteen inches from the curb of the sidewalk, and was about six inches high and four inches in diameter at the top.

Error Book p. 6, 7, fols. 19, 21.

It also appeared upon the trial that the place where the defendant in error fell, and where the stump over which he claimed to have stumbled stood, was prior to November, 1847, within and a portion of the City Hall Park.

Error Book, page 7, folio 22.

On the 18th November 1847, the Common Council of the city of New York adopted an ordinance authorizing the Committee on Lands and Places, together with the Street Commissioner, to adjust the lower corner line of the Park, so as to make a curve, &c.

Error Book, page 8, folio 2.

Under this ordinance the Committee and Street Commissioner shortened the park twenty feet, and threw that twenty feet into the public street.

Error Book, page 8, folio 24.
" " 10, " 29, 30.
" " 15.
See also maps.

The jury rendered a verdict in favor of the defendant in error for the sum of ten thousand dollars damages. The exceptions may be found:

Error Book, page 8, folio 23.
" " 16, " 47.
" " 17, " 48, 51.
" " 19, " 56, 57.

POINTS.

I. The stump over which the defendant in error fell was not in a public street. The judgment of the Court below, therefore, cannot be sustained.

(*a.*) The claim in this action is that by reason of the neglect of the plaintiff in error to remove an obstruction from a public street, the injuries complained of were received and the damages recovered sustained.

The evidence clearly establishes that, prior to 1847, the place where the accident occurred and the stump stood, was a part of the City Hall Park.

The only evidence that such place ever became a part of a public street is the resolution of the Common Council authorizing the Street Commissioner to curve the lower end of the Park, and the action of that officer under that resolution in cutting off twenty feet from the Park.

The question, then, is—Did this resolution, the action of the Street Commissioner under it, and the subsequent uses by the public of the space cut off from the Park, constitute that space a part of a public street? The resolution cannot have that effect, for the reason that the Common Council had no power to pass it.

Washburn on Easements, p. 156.
Commonwealth *vs.* Alburger, 1 Wharton, 469 485.
Commonwealth *vs.* Rush, 14 Penn., 186.
Lawrence *vs.* Mayor, 2 Barb., 577.

Prior to 1847 the space where the accident occurred had been a part of and in use as a public park for more than thirty years (Error Book, p. 8, fol. 25); and within the principles established by the authorities above cited it was clearly incompetent for the Common Council to diminish the Park by throwing a part of it into the street.

The ordinance being void, the act of the Street Commissioner was without authority.

Indeed, both that officer and the Common Council could have been restrained from such action at the suit of any citizen interested.

Trustees of Watertown *vs.* Cowan, 4 Paige 510.
Cady *vs.* Conger, 19, N. Y. R., 256.

(*b.*) The space in question as a part of the public park was a portion of the real estate owned by the Corporation of the city of New York.

In 1844 this real estate was, by an ordinance duly enacted, pledged to the redemption of the city debt.

This pledge was in 1845 confirmed and made absolute by an act of the State Legislature. (Revised Ordinances of 1859, chapter 9, p. 190—202. Session Laws of 1845, chapter 225, p. 248, § 5.)

The effect of this ordinance and act was to deprive the Common Council of any power to sell or dispose of any of the real estate of the Corporation. It would be quite as competent for the Common Council by resolution to convert a street with a park as to devote any portion of the public parks to the use of the public for streets.

The same principle which would justify the conversion of portion of a park into a street would support any other disposition of the public property which the Common Council might choose to make.

It is manifest, therefore, that neither the resolution of the Common Council nor the act of the Street Commissioner could constitute the space in question a part of a public street, for the reason that the resolution was void and the act of the officer unauthorized.

(*c*) In the city of New York the laying out, opening, altering, and widening of public streets is regulated by statute.

Session Laws, 1813, Chap. 86, § § 176, 178.

By this statute it is provided that whenever any street is to be laid out, opened, altered, enlarged, or improved, the Mayor, Aldermen, and Commonalty must apply to the Supreme Court for the appointment of Commissioners.

It is made the duty of the Commissioners to view the lands and tenements required for the improvement, and to make a just and equitable assessment of the loss and damage over the benefit and advantage. The statute further provides that if any lands, tenements, or premises belonging to the Mayor, Aldermen, and Commonalty of the city of New York shall be required for the improvement, they shall be compensated for the loss and damage they sustain in like manner as other owners and proprietors of premises.

The statute then enacts that upon the confirmation by the Supreme Court of the report which the Commissioners are required to make, the lands taken shall be appropriated and kept open for a public street forever.

Until, therefore, this space in question is shown to have been taken in conformity with requirements of statute, it cannot be regarded as a public street.

Matter of Commonwealth, 1 Wend., 262.
City of Oswego *vs.* Oswego Canal Co., 2 Selden 6 N. Y. R., p. 257.
Clements *vs.* Village of West Troy, 16 Barb., 251.
Northumberland *vs.* Atlantic and St. Lawrence R. R. Co., 35 New Hampshire, 574.
Commonwealth *vs.* Keily, 8 Grattan (Virginia), p. 632.
Holmes *vs.* Jersey City, 1 Beasley's (N. J.), p. 299.
Reid *vs* Town of Cornwall, 27 Conn., 48.
Underwood *vs.* Stuyvesant, 19 John's, 180.

The space in question having never been accepted as a part of a public street in the manner provided by law, the Corporation were not bound to remove the stump, nor are they liable for the injuries received by the defendant in error.

Bowman *vs.* City of Boston, 5 Cush., 1.

II. The exceptions to the charge of the learned Judge were well taken.

(*a*) The Judge charged: "So if an obstruction "on the face of the sidewalk over which a "person stumbles, boxes, if you please left out "on the sidewalk on a dark night, or barrels "over which a person stumbles and falls in "the absence of want of care on his "part—the defendants are equally liable for "the injury. The opening in the one case "and the obstruction in the other constitute "the negligence, are evidence of negli-"gence on the part of the authorities who "have control of the matter; and, in order to "escape from the charge of liability the "burden is thrown upon them to disprove "the negligence."

The charge thus asserts, that the existence of an obstruction in a street is evidence of negligence and constitutes negligence, and throws upon the defendants the burden of disproving the negligence. Under this charge, no question was left to the jury; for if the existence of the obstruction constitutes the negligence, it is clearly impossible to disprove the negligence without disproving the existence of the obstruction, and the charge was equivalent to saying that in every case in which an obstruction exists in a street the defendants would be liable.

III. The judgment should be reversed.

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